

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL A. FRINK,

Plaintiff-Appellant,

v

DONNA S. FRINK, a/k/a DONNA S.
JANNETTE,

Defendant-Appellee.

UNPUBLISHED

January 13, 2009

No. 287229

Oakland Circuit Court

Family Division

LC No. 1995-506249-DM

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

In this child custody matter, plaintiff appeals as of right the circuit court's order denying his motion to modify the judgment of divorce regarding the minor child's custody. We affirm.

The parties married in 1992, and the involved child was born in 1994. The circuit court entered a consent judgment of divorce in 1997, awarding the parties joint legal and physical custody of the child. In 2002, the circuit court permitted the child to relocate to Minnesota with defendant and her husband. Plaintiff's parenting time included the child's summer vacation and several school holidays.

In July 2008, plaintiff filed a motion seeking return of the child's physical custody to Michigan. Plaintiff asserted multiple grounds in support of his motion, including that the minor child (1) expressed a desire to reside in Michigan; (2) "nearly failed" the eighth grade and did not receive needed educational direction and guidance in defendant's home; (3) had severe acne that defendant refused to treat; and (4) regularly quarreled with defendant, requiring plaintiff's frequent telephone intervention. Plaintiff additionally claimed that defendant (1) used the child as a babysitter for her daycare business and her other children; (2) refused to promote the child's relationship with plaintiff; (3) admitted on several occasions that she could not handle the child, and (4) "continuously" violated the court-ordered parenting time schedule. Defendant opposed the motion, asserting that plaintiff's allegations failed to establish proper cause or a change in circumstances as required by *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003).

On August 6, 2008, the circuit court heard oral argument regarding plaintiff's motion, and ruled that his allegations failed to

rise[] to the level of a change in circumstances or even proper cause for the matter to be reviewed. It is not at all unusual or atypical for a 14 year old boy to wish to spend more time with his father. Unfortunately, when you have parties that don't agree, the child is put in the middle. But that in and of itself is not a basis for a change of custody.

The issue of difficulty with parenting time. I have to say that I have been looking at the docket entries and even what has been ever sent to the Friend of the Court, since I had that capability, I don't see anything with respect to a parenting issue ever being brought before this Court, or, for that matter, a complaint with the Friend of the Court. And even though that may or may not be the case, the appropriate remedy would be to show cause for non-compliance with the parenting time, not for a change of custody.

And then the last matter regarding the grades. I don't know what his grades were before, I have no idea, but he's not—his grades aren't failing grades. They may certainly be better, but it isn't of such a magnitude that this Court feels that that is a factor to be considered in the change of custody.

So, as it relates to the motion for change of custody, I am going to deny that motion.

Plaintiff now appeals the circuit court's ruling.

Plaintiff first contends that the circuit court erred by neglecting to conduct an evidentiary hearing before denying his motion to change custody. Child custody orders "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 876-877, 526 NW2d 889 (1994).

The Child Custody Act "is intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive change of custody orders." *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995). Before a circuit court may consider whether an established custodial environment exists or review the best interest factors, it first must determine whether the movant has established either proper cause or a change of circumstances. *Vodvarka, supra* at 509. This Court described in *Vokvarka* that "in order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (emphasis in original). We pointed out in *Vodvarka* that time always produces some alterations in a child's "environment, behavior and well-being," but that "normal life changes" do not suffice to demonstrate changed circumstances; instead, "there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id.* at 513-514. The circuit court must make findings of fact with respect to whether a movant has established proper cause or a change of circumstances to warrant an evidentiary hearing regarding a proposed custodial change, and these findings "should be affirmed unless the evidence clearly preponderates in the opposite direction." *Id.* at 507, 512 (internal quotation omitted).

In this case, we discern no error in the circuit court's conclusion that plaintiff failed to establish a change of circumstances or proper cause to change custody that would merit an evidentiary hearing. Plaintiff's allegations focused primarily on the 14-year-old child's discontent with his Minnesota home environment, and the boy's current preference to live in Michigan. As noted by the circuit court, the child's desire to live with his father does not qualify as a "material change" likely to have an effect on the child's well-being. *Vodvarka, supra* at 513-514. A child's shifting attitudes and preferences regarding the custodial parent "will almost never" justify changing a previous custody determination. *Curylo v Curylo*, 104 Mich App 340, 349; 304 NW2d 575 (1981).

Nor do any of plaintiff's additional assertions or documentation in support of his motion tend to establish that significant circumstances affecting the child materially changed. Plaintiff failed to demonstrate that the child's allegedly poor grades represented an academic change, and did not produce any documentation supporting his claims regarding the seriousness of the child's acne. Defendant's purported failure to fully cooperate regarding the parenting-time schedule lacked relevance to changed circumstances; disputes involving visitation issues do not provide a proper basis for changing custody. *Adams v Adams*, 100 Mich App 1, 13; 298 NW2d 871 (1980). In summary, the evidence did not clearly preponderate against the circuit court's findings that none of plaintiff's claims qualified as proper cause or a change of circumstances significant enough to justify revisiting custody issues at an evidentiary hearing. Because plaintiff failed to meet the threshold requirement of demonstrating proper cause or changed circumstances that would significantly affect the child's well-being, the circuit court did not abuse its discretion by denying his motion to change custody without conducting an evidentiary hearing.

Plaintiff next argues that the circuit court erred when it rendered its bench decision by failing to specifically address each of the factual allegations contained in his motion, and by neglecting to articulate the evidentiary standard of proof that it applied. "Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." MCR 2.517(A)(4). Plaintiff asserts that the circuit court had to set forth its factual findings and legal conclusions pursuant to MCR 3.210(D)(1), which provides that "findings of fact and conclusions of law are required on contested postjudgment motions to modify a final judgment or order." After reviewing the record, we conclude that the circuit court's findings sufficiently addressed the facts and the law underlying plaintiff's claims. See MCR 2.517(A)(2) ("Brief, definite and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts."). Although the circuit court did not specifically identify the burden of proof that it employed, the hearing transcript as a whole supports that the court properly applied the preponderance of the evidence standard. Therefore, we reject that the circuit court erred by inadequately describing the facts and law on which it based its decision.

Plaintiff next challenges the circuit court's refusal to interview the child before deciding his motion. However, the circuit court need not conduct an interview under MCR 3.210(C)(5) to determine a child's "reasonable preference," an undertaking relevant to ascertaining one of the best interest factors, MCL 722.23(i), unless the moving party first demonstrates the threshold requirement of proper cause or changed circumstances. *Vodvarka, supra* at 511-512. Because plaintiff failed to make the requisite predicate showing, the circuit court did not commit a clear legal error by declining to conduct an interview.

Plaintiff lastly contends that the circuit court should have awarded him temporary custody of the child pending an evidentiary hearing. In light of our determination that plaintiff failed to establish a change in circumstances or proper cause for a custodial change, we reject that any aspect of the child's situation warranted a temporary custody award changing his custody from Minnesota to Michigan.

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher